IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1964

Nos. 83 and 140

NORTHERN NATURAL GAS COMPANY, a Corporation, and CITIES SERVICE GAS COMPANY, a Corporation,
Appellants,

vs.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS et al.,
Appellees.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JOINT REPLY BRIEF OF APPELLANTS TO MEMORANDUM BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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The position taken by the Federal Power Commission in these appeals disregards the dominant issue presented to this Court, misinterprets the direct operative effect of

the orders here in question, misconstrues the decisions of this Court, interpreting the Natural Gas Act, and presupposes a fallacious and nonexistent factual basis to support its position that these cases do not present a substantial federal question. That position is diametrically opposed to the one previously announced by it in the first phase of this controversy submitted to this Court in *Northern Nat. Gas Co. v. State Corp. Com.*, (1963) 372 U.S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646, reh. den. 372 U.S. 960, 10 L. Ed. 2d 14, 83 S. Ct. 1011. Such will be demonstrated by appellants to the Court in this brief.

I

The Federal Power Commission Assumes a Fallacious and Nonexistent Factual Basis to Support Its Views

The F. P. C. memorandum displays a complete misunderstanding of the facts involved in these appeals and the effect of these state orders on the functions of the interstate operation of natural gas pipeline purchasers in the Kansas Hugoton gas field. *The F.P.C. understood all this once.* In *Northern, supra*, the first phase of these appeals, the F.P.C. early filed a memorandum with this Court as *amicus curiae* taking the position on appellees' motion to dismiss, that the federal questions were substantial and warranted plenary consideration by this Court (p. 2). There it stated th t the entire Hugoton field, which extends also into Oklahoma and Texas constitutes a single source of supply. It attached to the memorandum a map of the Kansas portion of the field showing with respect to each section the pipeline or pipelines connected to the wells in such section, and showing that the connections of each pipeline are interspersed with those of others in such

high degree that differences in rate of take between one pipeline and another must necessarily result in drainage. It stated that it had reviewed the Kansas Commission gas proration orders and reports, and that they showed that the takes of the six leading purchasers in 1961, expressed as percentages of the allowable production of the wells with which they were connected, varied from 81.58% to 96.43%, calling this "substantial differences in the rates of take among the various purchasers in the Kansas-Hugoton field." It went on to state that the year 1960 showed a comparable range, and concluded therefrom that the Kansas Commission was not protecting the correlative rights of adjacent land owners, but rather was freely tolerating "inequalities in the pipelines' several rates of purchase and thereby permit (ting) continued drainage from groups of wells to neighboring groups." (*id.* 3).

It advised this Court that its review of the course of regulation by the Kansas Commission during the last several years prior thereto confirmed its view that the Kansas Commission was endeavoring to constrain interstate pipelines to buy more gas from Kansas sources.[1]

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1. The F.P.C. memorandum stated on pages, 4, 5, 6, 7 and 8:

"On January 22, 1958, the Commission issued a report and order changing its method of fixing allowables. Kansas State Corporation Commission, *Twenty-Fourth Biennial Report*, p. 213. Theretofore, the nominations by purchasers from the Kansas-Hugoton field of the amounts they expected to purchase during the ensuing six-month period had been considered by the Commission to be the market demand for the field (*id.* at p. 216). Stating that the Oklahoma portion of the reservoir was being depleted approximately twice as fast as the Kansas portion and the Texas portion at an even higher rate (with consequent drainage to those states f. m Kansas) (*id.* at p. 215), the Commission decided that, in determining market demand in the future it should consider, in addition to the nominations by purchasers, the following factors (*id.* at p. 218):

(1) Takes from other sources of supply to which the purchasers are connected

As the F.P.C. stated (*id.* p. 8) the Kansas Commission has, in its proration orders, been basing its determination of "the market demand" on evidence showing that if the

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(2) The total markets for natural gas of all purchasers from the Kansas-Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

"The concurring opinion of Chairman Beatty emphasized the objective of increasing Kansas production at the expense of Oklahoma (*id.* at pp. 210-220):

Intervenors have urged us to continue the practice of setting high monthly allowables which was started by the Commission in April, 1956. They have asked us to increase the allowables 25% more even though the Commission since April, 1956, has been allowing somewhat more than the market actually absorbed. This benefited pipe line companies in need of gas, usually those overproduced. It was coercive on those who did not have proportional markets, those usually underproduced. It has not been effective so far, but if and when it has the intended effect of forcing higher takes, it will allow the producers and royalty owners to convert their minerals into cash more quickly. The only visible results in the last nineteen months, however, have been no increase in takes and a gradually mounting net underage. The net allowable is now 52 million M.c.f. higher than the amount that will be actually taken and marketed this month, but if it is carried for awhile, the pipe line companies may find a market for it.

* * *

I am most heartily in favor of Kansas resources being harvested and marketed by Kansas people and Kansas industries, rather than by Oklahomans, and my sympathies are with the Kansas royalty owners, some of whom have had to sell their birthright to the pipe line companies for a mess of pottage (as low as 3¢ to 8¢ per M.c.f.) and are now having the pottage rationed to them in small spoonfuls, but whether we, a conservation commission, should try to force the sale and depletion of our natural gas at today's low prices, raises another question. Gas is a most desirable fuel. America's reserves of natural gas are being depleted one hundred times faster than our coal reserves. Aside from the question of our authority and jurisdiction to execute such a program under present conservation statutes, such a program may, in retrospect, prove to be very unwise, considering the welfare of the state as a whole.

"Notwithstanding the recognition that the mere raising of the allowables had not been effective so far, the Kansas

interstate pipeline purchasers took gas from the Kansas Hugoton field at the same rate relative to reserves as from their other connections the "fair market demand" for the field would be in excess of the pipelines' nominations, and each time Kansas Commission allowables have exceeded those nominations. Each of such proration orders has contained findings that the Kansas Commission is not bound by the contractual relationships between producers and purchasers, and that the Kansas portion of the Hugoton field has not been getting its fair share of the purchasers' markets.

Commission continued to consider factors other than the purchasers' nominations in determining the 'market demand,' on which allowable production from the Kansas-Hugoton field has been based. Thus, in its order of October 8, 1958, determining market demand for proration purposes, the Commission found that the pipelines' nominations totalled 238,634,540 Mcf for the six months ending March 31, 1959, and that this total was lower than the nominations for the same periods of the two preceding years. It found that 'the consumptive market of the purchasing pipeline companies has increased' since March 31, 1958, and noted evidence that—

> • • • if the five largest purchasers (purchasing pipeline companies) would take gas from the Kansas-Hugoton Gas Field at the same rate based on comparative gas reserves as they now do from the other sources to which they are connected, the Kansas-Hugoton Gas Field's fair share of the markets would be 676,904,000 Mcf for the twelve months' period This indicates that the market demand for the next six months would be approximately 430,000,000 Mcf. • • •

The commission ultimately fixed total allowables for the six-month period at 255,000,000 Mcf.

> "In a similar order, dated April 22, 1959, fixing allowables for the six months from April 1 to September 30 of that year, the Kansas commission again found that the pipelines' nominations of 169,413,250 Mcf did not reflect the 'fair market demand' for the Kansas-Hugoton field. Evidence showed that, if the five largest purchasers took gas from that field at the same rate relative to reserves as from their other connections, the field's share would be 241,519,000 Mcf. Evidence also showed that the Kansas-Hugoton reserves of the four leading purchasers amounted to 44% of their total reserves, but that these companies were supplying only 23%

The orders complained of in the instant appeals, which are the same orders and regulations above referred to by the F.P.C. in such *amicus curiae* memorandum, have been accumulating from May, 1956 to date. It is impossible to understand how the F.P.C. can in one context (*id.* p. 9) state that the regulations and orders of the Kansas Commission there involved:

> "* * * do not regulate such matters as 'the drilling and spacing of wells' (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 603), or 'the physical activities, facilities, and properties used in the production and gathering of natural gas' (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678) * * *."

and state in the instant context that *these* orders "are directed at producers rather than pipelines, and regulate production rather than purchasing", and that therefore "they fall within the sphere of natural gas regulation re-

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of their over-all markets with Kansas-Hugoton gas. Although evidence as to drainage of gas from Kansas into Oklahoma was conflicting and inconclusive, the total allowables were fixed at 175,000,000 Mcf, or 5,586,750 Mcf above the pipelines' nominations.

"In another order, dated November 10, 1959, fixing allowables for the six months to March 31, 1960, the Commission said:

> Nominations and runs are often controlled or influenced by contracts between the producers and purchasers. These contracts do not necessarily bear any relationship to the market demand for gas from the Kansas-Hugoton Gas Field or any gas field, and they are not binding upon the Commission in carrying out its regulatory duties.

"In each subsequent proration order, the 'market demand' has been based on considerations similar to those stated in the orders discussed above, and each time allowables have exceeded the nominations of the pipelines. Each order has contained findings that the Commission is not bound by the contractual relationships between producers and purchasers; that the Kansas-Hugoton field is not getting its fair share of the purchasers' markets; and that purchases have been lower, in proportion to reserves, in Kansas-Hugoton than over-all."

served to the States by Section 1 (b) of the Natural Gas Act, 15 U.S.C. 717 (b)."

(FPC *amicus curiae* memorandum in these cases, p. 2)

The F.P.C. (p. 12, *amicus curiae* memorandum, these cases) attempts to distinguish its position in 1962 *vis a vis* 1964, by asserting that in its earlier memorandum it stated that the "ratable-take" orders there involved supplied the element that was missing in the Kansas Commission's previous attempts to force more Kansas gas into the interstate market by merely raising the allowables or ceilings.[2]

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2. Irrespective of its studious choice of words in its two opinions here under review the Kansas Supreme Court has never been in doubt as to the purpose and operative effect of the Kansas Commission's allowable orders since May of 1956. In its opinion denying motion for rehearing in *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 624, 625, 364 P.2d 668, the Court stated:

> "Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas-Hugoton field to that part of the field in Oklahoma.
>
> "Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.
>
> "Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws*. It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines."

But this is based on a misreading of *Northern, supra*, since that case did not turn on the mere fact that the orders there were directed at purchasers rather than producers. (Cf. *Cities Service Gas Co. v. State Corporation Commission*, 180 Kan. 454, 461, 304 P.2d 528, reversed by this Court in its *per curiam* opinion at 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381, despite the fact the Kansas Court had analyzed the Kansas Commission minimum price order and construed it as being directed primarily at producers rather than purchasers.) Furthermore, even if these instant orders were not having any particular impact in 1958, in respect of forcing more Kansas gas into the interstate market, it is an unwarranted assumption that the same must have been true in 1959, and years subsequent thereto. It was in such subsequent years that the heavy accumulation of underages (allowables in excess of purchasers' market demand) began to result in substantial cancellations, which themselves impose a serious penalty for noncompliance with the Kansas Commission policy of forcing higher takes from the field.[3]

What was cancelled was the right to take (purchase) and place into interstate transmission natural gas dedicated to particular interstate markets by long term gas purchase contracts, after the sales and service under those contracts had been certificated by the Federal Power Commission as being required by the public convenience and necessity.

At page 10 of its memorandum the Federal Power Commission mistakenly asserts that these appellants do not

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3. By July 1, 1963, the Kansas Hugoton gas field had approximately 300 billion cubic feet of underages on the Kansas Commission schedules; of that amount, approximately 80 billion cubic feet of underages were cancelled. (Views and Comments of Northern Natural Gas Company and Cities Service Gas Company, R. II, Vol. VIII, part 3, p. 17)

question the power of the Kansas Commission to cancel underages. This is simply not correct, for it is the cancellation of those underages which has damaged appellants, and which provides the goad or whip which the Kansas Commission has wielded to force greater takes from the Kansas part of the field. The Federal Power Commission (*id.* p. 5), after an over-simplified analysis of the Kansas Commission's previous method of proration of gas (field-in-balance, pre-May, 1956), appears to challenge the validity of that method of proration because, it asserts, an under-connected purchaser in the field could not secure all of the gas from that field it desired. On the other hand, the F.P.C. (*id.* p. 10) criticizes appellants for not challenging the same Basic Proration Order, even though it is clear that cancellations can result under its mechanics. The validity or invalidity of the Basic Proration Order itself or the Commission's method of gas proration prior to May, 1956, are not at issue here.

It makes not one iota of difference what formula or method the Kansas Commission has used in the past. That is not the problem in these appeals. As was well stated by this Court in *Northern, supra*, page 93:

> "* * * the problem is *only* whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power (conservation of natural resources) if those means *threaten effectuation* of the federal regulatory scheme." (Emphasis and parenthetical insert supplied.)

Put another way, do the orders of the Kansas Commission presently before this Court upon this record, by operative effect, impede the jurisdiction of the Federal Power Commission in consummating its duties enjoined upon it by Congress under the Natural Gas Act?

The F.P.C. chides appellants for not challenging any specific cancellation order (*id.* p. 10). This is simply not the case. As will be noted from a review of the record, the Kansas Commission allowable orders are the orders which result in cancellation, and each order is challenged.

The main thrust of argument in the F.P.C. memorandum appears to be that since the Kansas Commission has in fact declared a moratorium upon the further cancellation of underages and has announced that any underages previously cancelled will be reinstated *under certain conditions*, that these appeals are premature—that there is "no occasion for the Court to entertain (them) at this time." But the "gift" of reinstatement is only illusory even though obviously calculated to make these appeals untenable in a context where the Kansas Commission probably felt they were otherwise tenable. (See Jurisdictional Statement, No. 83, footnote No. 33, p. 29.) The taste of the wine of power is potent. One must assume that the Kansas Commission is familiar with the biblical expression "The Lord giveth and the Lord taketh away." Here the Kansas Commission took it away and giveth it back—maybe.[4]

The F.P.C. memorandum seems to argue in a vacuum, putting up and knocking down non-existent strawmen. It states on page 7:

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4. To correctly understand the possible effect of this expression of largess on the part of the Kansas Commission in its order restoring underages it had previously cancelled, there must be taken into consideration the complete physical impossibility of such restored underages being run within the 12-month limitation period fixed by the Kansas Commission. That this physical impossibility existed at such time is made evident by the fact that the Kansas Commission has presently noticed a public hearing for November 5, 1964, to determine whether or not the time for running restored underages (previously cancelled) should be extended.

> "The State of Kansas plainly has no duty under federal law to regulate the production of natural gas *at all* * * *."

Appellants were not aware this statement was an issue here. Obviously if there had been no state regulation of production there would have been no cancellation of underages, legal or illegal. One of the overriding issues here is whether the Kansas Commission, under the guise of gas proration, may, by direct operative effect, force interstate pipeline purchasers in the Kansas Hugoton field, such as these appellants, to increase their purchases of gas therein, thereby forcing them to reduce their purchases from other fields within and without the State, or, as a consequence of their failure so to do, suffer their dedicated gas reserves to be necessarily diverted to another underconnected pipeline company taking gas from such field to satisfy its markets and thus be lost forever.[5]

From its apparent complete failure to understand the Kansas Commission orders here complained of, the F.P.C. reaches the conclusion set out on page 9 of its memo:

> "The logic of the appellants' argument would thus lead to the extraordinary conclusion that the less restrictive the State's regulation of production becomes, the more it impinges upon the jurisdiction of the Power Commission, and that a State statute which did away with the proration system altogether would represent the maximum encroachment upon the federal domain."

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5. As the F.P.C. *amicus curiae* memorandum supporting appellant's jurisdictional statement in *Northern*, *supra*, stated on pages 9 and 10:

> "Moreover, to the extent that the Kansas Commission's action constrains interstate pipelines to alter their takes of gas from different wells—both those located in Kansas and those located in other States—the action has direct impact upon the cost of gas to the pipelines and to the ultimate consumers."

What the F.P.C. memorandum utterly fails to demonstrate is that the restriction in the Kansas orders complained of is absolutely lacking as to the *volumes* of gas which any purchaser may run in the field, but is effectual in *compelling fictitiously increased allowables to be either run or lost.*

II

The Dominant Issue Presented in These Cases

The controlling question in these appeals remains in legal effect the same as that presented by *Northern, supra.* On page 93 of this Court's opinion in that case it is said.

> "But the problem of this case is not as to the existence or even the scope of a State's power to conserve its natural resources; the problem is only whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power if those means threaten effectuation of the federal regulatory scheme."

There is no distinction, either in logic or law, between orders directed at a purchaser of natural gas in interstate commerce for resale and orders the operative effect of which accomplish the same result. The Court will always look through the form to the substance of allegedly invalid orders.

The F.P.C. on page 2 of its brief in this litigation, casts its argument in one mold when it asserts:

> "The appellants nonetheless contend that the challenged orders encroach upon the jurisdiction of the Power Commission under the Natural Gas Act. However, inasmuch as the instant orders, unlike the ratable-take orders condemned by this Court in *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, are directed at producers rather

than pipelines, and regulate production rather than purchasing, the Power Commission believes that they fall within the sphere of natural gas regulation reserved to the States by Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b). To be sure, an indirect effect of the orders may be to increase the overall pipeline purchases in the Kansas and Hugoton Field. But the orders themselves do not require any such increase or indeed any modification whatever in established purchasing patterns. (Such orders, however, do so by direct operative effect.) (Parenthetical insert supplied.)

In the previous phase of this controversy, on page 25 of its brief, on the merits in *Northern, supra*, the F.P.C. cast its argument in a totally different mold, saying.

"The natural gas industry differs from other industries in that the production of the commodity (i.e., the withdrawal of gas from the well) and its movement into interstate channels constitute one and the same physical operation. Thus, a regulation limiting the volume a pipeline may purchase from a given well would be tantamount in effect to a limitation upon the production of that well. *In order, therefore, to determine whether the present orders fall within the 'production and gathering' exemption of Section 1(b), it is necessary to look beyond their nominal subject matter and attempt to discern the degree and nature of their impact upon interstate commerce.*" (Emphasis supplied.)

And on page 30 saying:

"*A scheme of regulation which carries with it the practical consequence that interstate pipe lines must take increased quantities of gas from a State (or pay contractual penalties) (or, as appellants show in this litigation, suffer other extremely adverse consequences) cannot be regarded as a conservation measure*

> *or as a regulation within the boundaries of the 'production and gathering' exemption set forth in section 1(b) of the Natural Gas Act. Rather, it is a 'regulation of interstate commerce—one which stands on no better footing than the Kansas minimum price regulation which this Court ha already held invalid. Cities Service Gas Co.* v. *State Corp. Commission of Kansas,* 355 U.S. 391." (Emphasis and second parenthetical insert supplied.)

The respective positions of the Federal Power Commission taken as above set forth are clearly inconsistent with each other. The position it took in the first phase of this controversy is the correct one. That which it has taken in this litigation is patently erroneous. If the State of Kansas has the regulatory power to "increase the overall' pipelin purchases in the Kansas Hugoton field, whether this effect of its orders be direct or indirect, then each other state has similar powers. Whether the exercise of this power constitutes a direct or oblique attack upon the comprehensive scheme of federal regulation is of no consequence. What the Court said in *Northern, supra,* pages 92-93, is fully applicable here:

> "It may be true, as the State Commission urges, that accommodation on the part of the Federal Power Commission could *avoid* direct collision—but this argument misses the point. *Not* the *federal but* the *state regulation must be subordinated, when Congress has so plainly occupied the regulatory field. Cf. San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 3 L. Ed 2d 775, 79 S. Ct. 773. We have already said that the *question* to be asked under this *statute* is *'whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.' Federal Power Com.* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 19-20, 5 L. Ed. 2d 377, 389, 390, 81 S. Ct. 435." (Emphasis supplied.)

Apparently the F.P.C. is here attempting to revert to the position it took in *Phillips Petroleum Co.* v. *Wisconsin*, (1954) 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (and rejected by the Court), where, on page 677 of the opinion, this Court said:

> "They (petitioners, including F.P.C.) contend, however, that the affirmative grant of jurisdiction over such sales in the first clause of Section 1(b) is limited by the negative second clause of the section. In particular, the contention is made that the sales by Phillips are a part of the 'production or gathering of natural gas' to which the Commission's jurisdiction expressly does not extend." (Parenthetical insert supplied.)

This Court then said: "We do not agree." The Court thereupon proceeded to analyze Section 1(b) of the Natural Gas Act and its adjudicated cases pertaining thereto. Insofar as appellants are aware this Court has not departed from its rule in *Phillips, supra*, but has consistently adhered thereto.

III

Federal Power Commission Misinterprets the Operative Effect of These Orders

In *Phillips, supra* (p. 679), this Court, referring to *Interstate Natural Gas Co.* v. *Federal Power Com.*, 331 U.S. 682, 690-691, 91 L. Ed. 1742, 67 S. Ct. 1482, noted that exemptions to the primary grant of jurisdiction in the Federal Power Commission under Section 1(b) of the Natural Gas Act are to be *strictly* construed, and held that such section conferred jurisdiction in the Commission over sales in interstate commerce of natural gas for resale. It further held (p. 681):

> "The cases discussed above supply a ready answer to the determination of the Commission and also to peti-

tioners' suggestion that 'production or gathering' should be construed to mean the '*business*' of production and gathering, with the sale of the product considered as an integral part of such '*business*'. We see no reason to depart from our previous decisions, especially since they are consistent with the language and legislative history of the Natural Gas Act." (Emphasis supplied.)

In *Saturn Oil & Gas Company* v. *Federal Power Com'n*, (C.A. 10, 1957) 250 F.2d 61, Cert. Den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542, that Court had under consideration the wellhead sale of natural gas without the process of gathering being involved. On page 68 of the opinion, that Court, after reviewing previous cases of this Court, determined this Court referred to Phillips

> "* * * as holding that *the production or gathering exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas and not to the business of production and gathering*. Until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such a sale the jurisdiction of the Commission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction." (Emphasis supplied.)

In this litigation wellhead sales of natural gas, as well as sales made after production and gathering, are involved, and were by dedication under long term contracts so involved and taking place years before the orders in question in this litigation were issued. Fixing the market demand for such gas or the allowable production thereof under the circumstances here presented is not a physical activity. It deals specifically with the "*business*" of the "*marketing and sale*" of such natural gas. See *Harper Oil Company*

v. *Federal Power Commission*, (C.A. 10, 1960) 284 F.2d 137, at page 139, where the Court said:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission (F.P.C.), he remains thereunder so long as production continues." (Parenthetical insert supplied.)

Cf. *Sunray Mid-Continent Oil Co.* v. *F.P.C.* 364 U.S. 137, 156, 4 L. Ed. 2d 1623, 80 S. Ct. 1392, 1403.

The jurisdictional grant to the F.P.C. under Section 1(b) of the Natural Gas Act is written in plain, positive, and understandable language. It says:

> "The provisions of this chapter shall apply to *the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale* * * *." (Emphasis supplied.)

Assuming, as we do, that the F.P.C. in the light of its expertise is qualified to speak concerning the withdrawal of gas from a well and whether it constitutes production or not, we refer again to page 25 of its brief on the merits in *Northern*, *supra*, namely,

> "The natural gas industry differs from other industries in that the production of the commodity (i.e., the withdrawal of gas from the well) and its movement into interstate channels constitute one and the same physical operation. Thus a regulation limiting (in these cases increasing) the volume a pipe line may (must in order to protect itself) purchase from a given well would be tantamount in effect to a limitation (here forcing an increase) upon the production of that well." (Parenthetical inserts supplied.)

We reiterate the operative effect of the orders here in question directly and adversely affects the sale and transportation of natural gas in interstate commerce for resale and therefore the orders threaten the comprehensive scheme of federal regulation.

IV

Federal Power Commission Has Misconstrued the Decisions of This Court

In *Northern*, *supra*, suggestion was made to this Court by the Federal Power Commission that if the Court should hold, as it subsequently did hold, that the orders invalidly invaded the federal regulatory jurisdiction, that the judgment should not be reversed but the case should be remanded to the Kansas Supreme Court for further consideration; the theory behind the suggestion being that the Supreme Court of Kansas might in the light of this Court's holding, then have the opportunity of holding that the orders effected a modification of the Republic "A" contract such as to permit performance of the contract through takings from the Republic wells in such lower amounts as might be necessary to achieve ratability with the takings from the wells of appellant's other producers (page 96 of the opinion). The Court said further:

> "In short, the suggestion is that the state court, if afforded the opportunity, might now so harmonize the Republic contract with the Commission's order *that there would result no measurable effect upon interstate transmissions or sales*." (Emphasis supplied.) (Id.)

The Court then said:

> "We reject this suggestion for several reasons."

It set out its reasons and in closing its discussion of the case held, on pages 97-98:

"In any event the suggestion misconceives the true nature of the question which the Kansas Supreme Court and this Court were called upon to decide. The federal question does not arise from an asserted actual and immediate conflict between the federal and state regulations. The question is whether the state orders may stand in the face of the pervasive scope of federal occupation of the field. Cf. San Diego Bldg. Trades Council v. Garmon, supra (359 U.S. at 241-244). Indeed, even if the issue of the accommodation of the Republic "A" contract with the orders had been actually framed in the lawsuit, *the mere fact that the Kansas Court might make the suggested accommodation would not necessarily permit the Kansas court or this Court to avoid decisions of the federal question, since even then it would have to be determined whether the orders invalidly jeopardize the Natural Gas Act's objective of uniformity.* See Federal Power Com. v. Transcontinental Gas Pipe Line Corp., supra (365 U.S. at 28). For, if the federal question could be avoided or postponed just short of actual collision, by ad hoc accommodation on the part of every State, then the scope of federal regulatory power would vary in accordance with the kaleidescopic variations of local contract law." (Emphasis supplied.)

It is clear therefore that this Court does have jurisdiction of these appeals and should exercise the same. To use the language of this Court on page 91 of *Northern, supra*, it must be said:

"These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain."

To be considered in this litigation is the fact that the Hugoton Gas Field is an interstate common source of supply. It is regulated in part by the Railroad Commission of Texas, in part by the Corporation Commission of Oklahoma, and in part by the Corporation Commission of Kansas. The same pipelines and purchasers do not serve all portions of this immense tri-state gas field. The market requirements of the respective pipeline purchasers vary, as well as the capacity of their lines. We note that the Federal Power Commission on page 8 of its brief in this litigation has this to say concerning this tri-state field:

> "Indeed, the only system of regulation calculated to eliminate that possibility altogether (interstate drainage) would be one which either imposed a uniform rate of production upon all wells in the field or which prescribed as a ceiling for all wells the lowest rate of production achieved by any of them. Appellants do not urge that such drastic regulation is constitutionally mandatory, but neither do they suggest any criteria for determining at what point the amount of probable drainage tolerated by the Commission's orders becomes, for constitutional purposes, excessive." (Parenthetical insert supplied.)

Appellants certainly do not here urge granting jurisdiction over proration of this tri-state field to the Federal Power Commission.[6] Appellants do suggest, however, as evidenced by the position taken in the respective jurisdictional statements, that the State of Kansas be not allowed, under the guise of regulating production, to extrapolate its jurisdiction into a field already occupied by Congress under the Natural Gas Act. To do so would immediately encourage Oklahoma and Texas to do like-

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6. Cf. *Federal Power Com. v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 19, 20, 5 L. Ed. 2d 377, 389, 390, 81 S. Ct. 435.

wise and another race between the states, as in the price fixing legislation recently struck down by this Court, would result in the abrogation of the comprehensive and effective regulatory scheme of the Natural Gas Act and consequent detriment to the ultimate consumers of natural gas.

We respectfully reiterate that the federal questions propounded by these appeals are substantial and warrant plenary consideration by this Court.

Respectfully submitted.

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